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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 597

FRANK De MARIE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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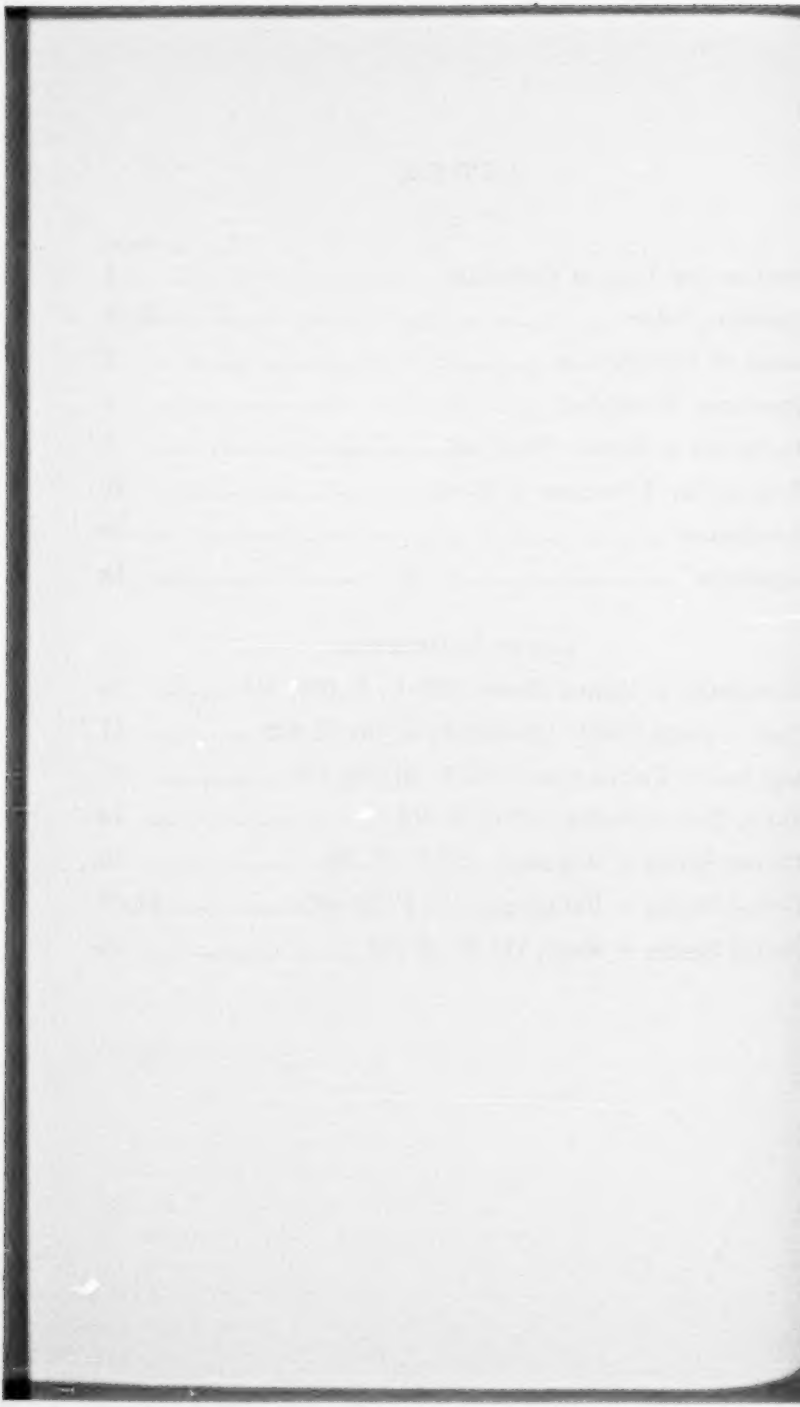

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No.

FRANK De MARIE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Frank De Marie, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on June 27, 1955, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith. The record

was not printed for use of the Court of Appeals, but was considered on the typewritten stenographic transcript and certified record of the trial Court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed Nov. 7, 1955, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the Record.

JURISDICTION.

On November 29, 1955, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix.) This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. Is it not prejudicial and reversible error for the Trial Court to impugn the sincerity and propriety of objections and motions by the defense attorney, in the presence of the Jury, where the occasion for the rebuke to counsel began with an improper question by the trial Judge and an ambiguous and improper answer by the Prosecutor, in the presence and hearing of the Jury; and did not the attack on counsel impinge upon and injure the the defendant's right to assistance of counsel?

2. Where the defendant has admitted, by testimony, that he performed the acts charged in the indictment, and presents a defense of entrapment, is it not inconsistent with a fair trial, to instruct the Jury that if they find the defendant did the acts charged or aided and

assisted in them, the Jury was authorized to find him guilty?

3. In instructions to the Jury did multiple successive references to statutory presumptions of guilt from possession, and to prima facie evidence of guilt from possession, of contraband, which possession the defendant admitted from the witness stand, nullify and contradict a prior instruction that entrapment was a complete defense; and were not these instructions thus so ambiguous and equivocal as to deprive the defendant of his right to a fair trial by Jury, especially where the Jury was not told to consider the instructions as a whole or single charge?

4. Did the ambiguous and equivocal instructions to the Jury nullify the theory of the defense of entrapment and thus deprive the defendant of his right to defend, and to have such defense fairly considered by the Jury?

STATEMENT OF THE CASE.

The petitioner was sentenced to ten years imprisonment and a fine of two thousand dollars, after verdict of guilty in a Jury trial.

There was little substantial question of fact except upon the issue of entrapment. The indictment charged two transactions in narcotics, each covered by three counts, which charged purchase, sale, and facilitation of transportation, respectively.

The defendant testified in his own behalf and admitted engaging in the two transactions charged, but denied any engagement in narcotics or actual knowledge thereof until induced by the Government informer and principal witness, Annerino, to introduce Annerino to Garelli, a co-

defendant. Thereafter the two sales and deliveries occurred.

Garelli entered a plea of guilty before this trial and after this trial was sentenced to two years imprisonment. He did not testify.

The Government's case consisted of the testimony of Annerino, the informer, and corroborative evidence by agents of the Narcotics Bureau who observed transfer of narcotics.

Annerino testified that while he was under indictment for prior narcotic violations, he was asked by an agent of the Narcotics Bureau if he could and would buy narcotics from De Marie. He then described the conversations and activities with De Marie, the petitioner, and Garelli, the co-defendant. These activities were all at the instance of Agent Durham and were observed by agents.

Annerino, in response to leading questions of the prosecutor, stated that before any approach or request by Agent Durham, he had held conversations with De Marie, in which De Marie had offered to supply narcotics. The petitioner, De Marie denied these prior conversations, when he testified in his own behalf. The agent, Durham was not questioned concerning his employment of Annerino to induce the petitioner to make the sales charged.

Thus the issue of whether the Government was justified in using Annerino to induce commission of the indicted offenses was left to the Jury on the testimony of Annerino the informer, and its contradiction by De Marie, the petitioner.

The specific matters on which error is claimed involve an episode in the re-direct examination of Annerino,

during which the Trial Judge asked a question of the prosecutor and criticized defense counsel in the presence of the Jury; and instructions to the Jury which the petitioner claims are contradictory and equivocal.

The re-direct examination, complained of, came after cross-examination of Annerino left him uncertain as to whether he had any conversation concerning narcotics with the petitioner, before Agent Durham solicited him to purchase narcotics from the petitioner.

The matter complained of follows (Tr. 62-65):

"By Mr. Calihan:

"Q. One question further, Mr. Annerino. Did you know at the time you talked to Agent Durham in the lobby of the Morrison Hotel here in Chicago, Illinois, did you know prior to that time whether Frank DeMarie was engaged in transactions relative to narcotics?

"By Mr. Walsh: I object to this, your Honor, and ask to withdraw a juror and have a mistrial declared.

"By Mr. Calihan: Your Honor, counsel went into this question very thoroughly, and I think that the time element as drawn out by counsel is not a bit clear.

"By the Court: Well, he may answer. Motion denied.

"By Mr. Walsh: The objection is overruled and the motion is denied.

"By the Court: Yes.

"By Mr. Calihan: Will you answer the question, please?

"By the Witness: Will you repeat the question?

"By Mr. Calihan: Read the question, please.

"By the Court: Do you know what answer he would make to that?

"By Mr. Walsh: I object to this in the presence of the jury. If your Honor please, the record will not show Mr. Calihan's indication to your Honor that he expects an affirmative answer.

"By the Court: Now you just told the jury what he did expect, which the jury didn't know.

"By Mr. Walsh: Your Honor, he nodded his head to your Honor.

"By Mr. Calihan: He asked if I knew what answer I expected, and I said "Yes."

"By Mr. Walsh: I think that should be on the record.

"By the Court: You just put it on the record of your own volition.

"By Mr. Calihan: I was merely answering in the affirmative that I knew what the man would say.

"By the Court: Objection sustained.

"By Mr. Walsh: I submit the conclusion that the jury would draw—

"By the Court: Denied.

"By Mr. Walsh: I ask that a juror be withdrawn and a mistrial declared.

"By the Court: I denied that for you. You can't put error in the record and then ask to have a juror withdrawn on that ground.

"By Mr. Walsh: I object to this.

"By the Court: That is just what I am telling you.

"By Mr. Walsh: I object, your Honor.

"By the Court: You said something which hadn't been said. If it was said, the jury hadn't seen or heard.

"By Mr. Walsh: I object to your Honor's statement.

"By the Court: That is just what I am putting on the record because that is exactly what happened.

"By Mr. Walsh: I renew my motion.

"By the Court: Your motion is denied. Anything else?

"By Mr. Calihan: I would like to have the question read.

"By Mr. Walsh: I object to this.

"By the Court: Objection sustained.

"By Mr. Calihan: Judge, we never did get to the answer.

"By the Court: I know it. I sustain the objection to it.

"By Mr. Calihan: Oh.

"By the Court: Anything else?

"By Mr. Calihan: Yes, I have another question."

Since the petitioner admitted the acts charged, the principal issue for the Jury was the validity of the defense of entrapment. The Trial Judge included the following instructions in his charge,

On the subject of entrapment:

"The Court instructs you that, while it is permissible for Government agents or officers to present to one intending or who is willing to commit a crime an opportunity to commit a crime, it is not proper for Government agents or officials to ensnare the innocent and law-abiding into the commission of crime. If a criminal design originates not with the accused, but is conceived in the mind of Government agents or officers, and the accused is lured into the commission of a criminal act by such Government agents or officers, it is not proper for the Government to prosecute or punish therefor. But if a defendant be ready, able and willing to commit an offense of the general character charged, and the officer only presents an opportunity to commit the specific offense charged, such offering of the opportunity to commit the specific offense is not entrapment.

"The Court instructs you that entrapment of a defendant by Government officers, if shown by the evidence, is a complete defense, and in cases where the defense of entrapment is presented two questions of fact arise: First, did the agent induce the defendant, the accused, to commit the offense charged in the indictment; second, if he did, was the accused ready and willing, without persuasion, and was he awaiting a propitious opportunity to commit the offense. On the first question, the accused has the burden of proof; on the second question, the Government has

the burden of proof, and as to such question it must prove that the accused was ready and willing, without persuasion, and that he was awaiting any propitious opportunity to commit the offense." (Tr. 320, 321).

Thereafter the Court included the following in his charge:

"These two counts, One and Four, allege a violation of a statute of the United States, which reads in part:

> 'It shall be unlawful for any person to purchase * * * narcotic drugs except in the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs *shall be prima facie evidence* of a violation of this Sub-Section by the person in whose possession same may be found.' (Emphasis supplied)

'Narcotic drugs' are defined to include 'any compound, manufacture, salt, derivative, or preparation of opium, and the Court instructs you that heroin is a derivative of opium.

"Before you may find the defendant De Marie guilty of the charges in either First or Fourth Counts of the indictment, you must believe from all the evidence and beyond a reasonable doubt that the defendant De Marie, at the time and place charged, knowingly, willfully, unlawfully and feloniously purchased and has in his possession the heroin described in that count, which was not in the original stamped package or from the original stamped package, as charged." (Tr. 322, 323).

"The Court further instructs you that *if you believe* from all the evidence and beyond a reasonable doubt *that the defendant De Marie had possession* of the narcotic drugs as charged in Counts Three and Six, *you are authorized to find him guilty* under Counts Three and Six unless he has explained such possession to your satisfaction. In other words, it is not necessary for the Government to prove that the

drugs were unlawfully imported or that the defendant knew them to be unlawfully imported, but possession by the defendant of such a narcotic drug *places the burden upon such defendant to prove* to your satisfaction *that they were not unlawfully imported* and *that he did not believe them to be unlawfully imported;* the *law presumes* that they were imported illegally, and the *burden of rebutting* that presumption is on the defendant." (Tr. 327) (Emphasis supplied)

"Accordingly, it is the law that one who aids, abets, counsels, commands, induces or procures a commission of a crime is punishable as a principal. If you believe from all the evidence and beyond a reasonable doubt that the defendant knowingly and willfully *committed the offenses charged in the indictment* or that he knowingly and willfully *aided, abetted, counselled,* commanded, induced or procured some other person or persons to do so, *then you may find him guilty* as charged in those counts of the indictment. (Emphasis supplied)

"On the other hand, if you believe from the evidence that the defendant, neither himself committed the offenses charged in the indictment, or that he aided, abetted, counselled, commanded, procured or induced any other person or persons so to do, then you must find him not guilty as charged in those counts of the indictment." (Tr. 328, 329).

Because the record was not printed for use below, by order of the Court of Appeals, these items from the record have been quoted in full.

Bail pending review was denied and the petitioner commenced service of the ten year sentence on June 27, 1955.

REASONS FOR GRANTING THE WRIT.

I.

This case merits review by this Court because the decision below ignores and conflicts with applicable decisions of this Court and Courts of Appeal. There is involved the denial of fundamental rights of an accused, and important fundamental issues important to the administration of criminal justice are presented for decision.

The Opinion of the Court of Appeals below disposes of the questions presented, by hard rules of contest, as applied to the lawyers and the trial Judge, rather than by consideration of the impact of events complained of, upon the right of an accused to a fair and impartial trial by the Jury.

WITH REGARD TO THE INSTRUCTIONS.

In disposing of the problems presented by the instructions to the Jury, the Court of Appeals below cited and quoted part of Rule 30 of the Federal Rules of Criminal Procedure, and then said at page 10 of its Opinion, (see Appendix hereto),

> "The only ruling on instructions validly before us is the court's refusal to follow the suggestion of defense counsel as to the order in which the instructions should be given. When counsel were discussing the instructions with the court, counsel for the defense said: 'It is my suggestion, Your Honor, that so far as the entrapment instruction is concerned, I would like to have it read to the jury as near to the end of the instructions as possible, so that its effect will not be lessened.' The court refused this request, saying that he was going to give the instructions in as nearly logical order as possible without 'trying to favor anybody.' It is well settled that on review

we must consider the instructions as a whole. *Boyd* v. *United States,* 271 U.S. 104; *United States* v. *Wicoff,* 7 Cir., 187 F. 2d 886. The instructions given by the court on statutory presumptions correctly stated the law and were not in conflict with the charge that entrapment is a complete defense. It did not matter which instruction was given first. The order of giving instructions was within the discretion of the trial judge. Neither party has the right to insist that his proposed instructions be given before or after those proposed by his opponent."

This treatment overlooked the effort of defense counsel to except to the trial Court's Charge, out of the presence of the Jury, in accordance with Rule 30 (Tr. 334-337).

It is urged that the point about which complaint was made was preserved, in the only way permitted by the trial Court, and that it was presented to that Court and passed upon adversely to the petitioner.

In any event, the errors complained of, so completely violated the right of the petitioner to fair trial by Jury, that they should be noticed as plain error under Rule 52(b) of the Federal Rules of Criminal Procedure, and should have been so considered by the Court of Appeals, even if it was correct in its construction of Rule 30.

The fault of the Charge lies in that the trial Court for practical purposes directed a verdict of guilty by *authorizing* a verdict of guilty if certain admitted facts were established. These facts were not in issue, under the evidence in this case, because the petitioner in his testimony, stated his commission of the acts involved in direct testimony. He admitted, or rather stated, his performance of the acts charged in the indictment and described in the instructions.

He relied upon the defense of entrapment. The issue on this question was close and depended on resolving the contradictory testimony of the Goverument's, informer Annerino, admittedly employed by a Government Agent Durham, to induce the petitioner to supply narcotics, as against the testimony of the petitioner. The issue of entrapment was further reduced to a narrow one of whether the petitioner was ready and willing, when approached by the informer.

The informer gave rather tenuous testimony of conversations, concerning narcotics, with the petitioner, before the time the agent asked him to seek out the petitioner. This testimony was denied by the petitioner, who told of the informer's entreaties and inducements, as occurring after the Government Agent inspired the informer's efforts. Both men were somewhat vague on dates, and the Government never proved the actual date on which Agent Durham sought out the informer and retained his services in inducing narcotic transactions by the petitioner. Agent Durham was not called upon to testify about his employment of the informer, although he did testify, and probably had complete notes and information on the subject.

With the only vital and crucial issue thus narrowed, the trial Court gave instructions which were obviously contradictory and equivocal. The entrapment instruction came early in the Charge. It did not directly and forthrightly command acquittal of the accused, if entrapment was proved, but merely stated that entrapment was a complete defense.

There followed charges that possession of unstamped narcotics was *prima facie* evidence of violation; and that

possession of narcotics placed the burden on the defendant to prove that the narcotics were not unlawfully imported; and that the law presumes the narcotics were illegally imported, and the burden of rebutting *that* presumption was on the defendant; and finally that if the jury believed the defendant did or aided in doing the acts charged, then the jury could find him guilty.

There was no instruction that the Charge should be considered as a whole by the jury. There was no reference back to the subject of entrapment in the instructions on the presumptions, *prima facie* evidence, burdens of rebuttal on the defendant, and authorizations to find the defendant guilty. The entrapment instruction did not limit the later instructions.

No explanation or definition of *prima facie* evidence was given. The accused having admitted the offenses and claimed entrapment, it is difficult to see how he could have rebutted the presumptions described.

The petitioner urges that the conflict in the instructions was obvious. It is not only possible that the instructions misled the jury, but it is probable that the jury felt constrained to return a verdict of guilty because the petitioner had admitted doing, and aiding in the doing of acts charged in the indictment and described in the instructions. The principal and crucial issue, which was entrapment, was not fairly presented for the consideration of the jury.

The action of the trial Court, and the opinion of the Court of Appeals below, was at variance with decisions of this Court and decisions of the Court of Appeals below.

In *Bollenbach* v. *United States,* 326 U. S. 607, at Page 614, the Supreme Court said:

> "It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading. See *Agnew* v. *United States,* 165 U.S. 36, 52, 41 L. ed. 624, 630, 17 S. Ct. 235. Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, Preliminary Treatise on Evidence (1878) cc 8 and 9; Wigmore, Evidence 3d ed. §§ 2490-2540; Morgan, Some Observations Concerning Presumptions (1931) 44 Harvard L. Rev. 906; Denning, Presumptions and Burdens (1945) 61 Law Quart. Rev. 379."

The Court of Appeals below in *United States* v. *Donnelley,* 179 F. 2d 227, 233, said that a conviction ought not rest on an equivocal direction on a basic issue. In the case at bar the basic issue was entrapment, which, even under the Government theory, was dependent on belief and construction of the testimony of Annerino, and the testimony of the defendant. No other witness testified on this issue, although Government witness, Agent Durham, who incited the informer, presumably had knowledge thereof.

The danger of submitting, inadequately, the problems involved in presumptions, shifting of the burden of proof, and *prima facie* evidence, is illustrated by the opinion of the Supreme Court in *Tot* v. *United States,* 319 U. S. 463.

In two decisions the Court of Appeals below has noticed plain error in instructions, and reversed, despite failure of complete compliance with Rule 30 of the Federal Rules of Criminal Procedure. In *United States* v. *Balodimas,* (C.A. 7) 177 F. 2d 485, the Court of Appeals noted error

in instructions and reversed despite failure to completely comply with Rule 30, because the instruction was on a vital issue. In *United States* v. *Raub,* (C.A. 7) 177 F. 2d 312, the Court of Appeals noticed plain error in instructions under Rule 52(b) of the Federal Rules of Criminal Procedure, because an instruction impinged upon the right of the defendant to a fair trial by jury upon the basic issue of fraud.

It should be noted that the appeal in the *Balodimas* case was from the same trial Judge and involved compliance with Rule 30.

The danger of development of the custom of disregard, in trial Courts, for the mandate of Rule 30 of the Federal Rules of Criminal Procedure, which provides that opportunity shall be afforded, after the charge is given to the jury, for exceptions to the charge, out of the presence of the jury, should be curbed by expression of this Court, in the interest of fair administration of criminal justice.

This Court, by adoption of Rule 52(b) of the Federal Rules of Criminal Procedure and by decisions such as *United States* v. *Atkinson,* 297 U. S. 160, has stated that Appellate Courts, in the public interest, may, on their own motion, notice errors to which *no* exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. The petitioner contends that his effort to note exception to the charge and preserve the point concerning the errors in the instructions, was thwarted by the trial Court's failure to comply with, and to permit compliance with, Rule 30 of the Federal Rules of Criminal Procedure which provides that opportunity for exception to the charge shall be permitted, after the

charge in given to the jury, and out of the jury's presence. (Tr. 334-337). (See also Tr. 276, where the trial judge cut off discussion of the ambiguity of the proposed charge.)

WITH REGARD TO REBUKE OF COUNSEL FOR THE PETITIONER, IN THE PRESENCE OF THE JURY.

In the Statement of the Case herein, there is set forth at some length, certain occurrences during the re-direct testimony of the Government informer Annerino, the Government's only witness, on the subject of entrapment.

The petitioner contends that this part of the record shows that the trial Judge, in the presence of the jury, asked a highly dangerous question of the prosecutor, who responded by nodding his head in the affirmative and shaping the word "Yes" with his lips, in the presence of the jury. It is possible that not all of the jurors saw the word "Yes", but it is unquestionable that the affirmative nod by the prosecutor was in full sight and presence of the jury. It is submitted that this affirmative answer by the prosecutor was susceptible of the construction by jury, that the answer of the witness would be "Yes". In the exchange of remarks, involving objections, and a motion for mistrial, the trial Judge stated in the presence of the jury that the defense attorney, had told the jury something it did not know, had put error into the record, and had said something which hadn't been said.

It is submitted that these statements by the trial Judge so impugned the motives and conduct of the defense counsel that the petitioner's right to counsel was infringed upon.

In *Lau Lee* v. *United States,* 67 F. 2d 156 at Page 158 the Court of Appeals for the 9th Circuit reversed a conviction where counsel for the defense had argued that there was not a scintilla of evidence that a certain letter was signed. The Court of Appeals held that this statement by the defense counsel was in error and that it was the right of the Judge to point out the error. However, the trial Court there, went further and charged the defense counsel with attempting to mislead the jury. In the case at bar the trial court said to defense counsel in the presence of the jury "You said something which hadn't been said. If it was said, the jury hadn't seen or heard—."

In the *Lau Lee case,* 67 F. 2d 156 at Page 158 the Court said:

> "On the other hand, the Court has the right to correct erroneous or misleading statements made by the attorneys with reference to the evidence and the resulting prejudice to the defendants must be borne by them; but when the Court goes further and not only impugns his conduct but also his motives, he has gone too far. The ultimate question in every criminal case is whether the defendant shall be deprived of his property or liberty or life, and that question should not be obscured or affected by consideration of the motives of the defendant attorney.
>
> "For this error the case must be reversed."

In *Cook* v. *State,* 1952 (Alabama) 57 So. 2d 832 a state court there said:

> "If the presiding judge questions the sincerity or propriety of an objection and intimates in effect that it is an effort to withhold material testimony, the jury may adopt this view and follow the suggestion throughout the progress of the trial. If so, clearly, the appellant's attorney when he makes an objection places himself in a false light before the jury.

> "The Constitutional right of the accused to be heard by counsel could be seriously restricted even to the point that the right is in effect denied."

The error and the prejudice which arose from the Court's reprimand and charge of distortion against the defense counsel pervaded the remainder of the trial. Its effect upon the jury cannot be measured. The incident occurred in the presence of the jury, and perhaps some of the jurors saw the prosecutor's affirmative nod and perhaps some did not see it. The Court's statement that the defense counsel had said something which hadn't been said, obviously would have great effect and weight with the jury.

The inference of the question, left unanswered, in view of the prosecutor's affimative nod, and the word "Yes" to the Court's question could only leave upon the jury's mind the impression that De Marie must have been "engaged in transactions relative to narcotics." This was a crucial issue and the Government had the affirmative burden in the matter to prove such a situation as directly and forthrightly by proper questions and answers, as possible. This it did not do, but by inference sought to create the impression that De Marie had prior activity in narcotics.

The Court's rebuke of the defense attorney for his objections strengthened the Government's innuendo, established by the unanswered question.

The jury was not instructed to disregard the question or the exchange between the Court and counsel, and the error was not effectively corrected by the general charge to the jury at the conclusion of the case. (Tr. 313, 316).

The petitioner respectfully contends that the damage was such that the petitioner and his attorney were so discredited, that an instruction could not cure the effect.

It is respectfully submitted that this is a matter which requires review by this Court in the interest of the fair administration of criminal justice.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11506. OCTOBER TERM AND SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANK DE MARIE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 7, 1955.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* The defendant and his alleged accomplice, Mario Garelli, were indicted for unlawfully buying and selling narcotic drugs not in their original stamped packages and without a written order from the purchaser, and with having fraudulently and knowingly received, concealed and facilitated the transportation and concealment of narcotic drugs, in violation of the Food and Drug Act (21 U. S. C. A. Sec. 174), and the Internal Revenue Code (26 U. S. C. A. Secs. 2553(a) and 2554(a) and 26 U. S. C. A. Secs. 4704(a) and 4705(a)). Garelli, the alleged accomplice, pleaded guilty. The defendant pleaded not guilty, was tried by a jury and found guilty.

The errors claimed on this appeal are the trial judge's refusal to grant defendant's motions for acquittal at the close of the Government's case and again at the close of all the evidence, and the denial of defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The first substantive ground for these motions was the defendant's claim that the evidence sustained the defense of entrapment as a matter of law.

Acting on instructions from federal narcotics agents, Anthony Annerino, an informer, contacted the defendant by telephone and told him that he wanted to purchase narcotics. At a meeting arranged in the City of Chicago, Annerino and Narcotics Agent Marin met the defendant, and Annerino purchased narcotics from defendant. This occurred twice during February of 1954. Annerino testified that he had known De Marie for about five years, that in October 1953 he had asked De Marie about procuring narcotics and De Marie promised to take care of him; that on or about January 23, 1954, he again had a conversation with De Marie in which he told De Marie he wanted five ounces of heroin, and that De Marie then gave him his telephone number and explained how and when to order the heroin by phone. While the testimony of Annerino was not too definite as to the dates on which he first contacted De Marie as to the purchase of narcotics, his testimony furnished a sufficient basis for the jury to find that he contacted De Marie to purchase narcotics before he (Annerino) had been approached by the narcotics agents and had been asked to assist them in securing evidence of violations of the narcotics law by the defendant.

There is no entrapment unless the intent to commit the crime initiated in the minds of the Government officers and was transferred by them to the mind of the defend-

ant. To raise the defense successfully the defendant must show that he had no intention of committing the crime until induced to do so by, or on behalf of, Government officers, *United States* v. *Cerone*, 7 Cir., 150 F. 2d 382, certiorari denied 326 U. S. 756. In the instant case there was evidence that the defendant was not only contemplating selling narcotics to Annerino but that he had even offered to do so before Government agents approached Annerino. Where the officers only furnished the defendant with an opportunity to carry out a crime which he was already willing to commit, there is no entrapment. *United States* v. *Spadafora*, 7 Cir., 181 F. 2d 957, certiorari denied 340 U. S. 897; *Louie Hung* v. *United States*, 9 Cir., 111 F. 2d 325. Here there was substantial evidence from which the jury could and did find that the defendant intended to sell narcotics before he was approached on behalf of the federal naroctics agents. *Lunsford* v. *United States*, 10 Cir. 200 F. 2d 237. It was, therefore, proper for the trial judge to submit the question of entrapment to the jury, and the jury was justified in finding that entrapment did not exist.

While Annerino was on the witness stand, the Government attorney on redirect examination asked the following question:

> "One question further, Mr. Annerino, did you know at the time you talked to Agent Durham in the lobby of the Morrision Hotel here in Chicago, Illinois, did you know prior to that time whether Frank De Marie was engaged in transactions relative to narcotics?"

The defense attorney objected to the question and asked the judge to declare a mistrial. The judge overruled the objection, and then asked the attorney conducting the prosecution if he knew how the witness would answer. The attorney turned his back to the jury, walked toward the bench, nodded his head and formed the word, "Yes,"

on his lips without speaking it audibly. The defense attorney then again asked that a juror be withdrawn and a mistrial declared, and stated for the record that the prosecutor had indicated that Annerino would have answered, "Yes," to the question. The judge then said: "Now you just told the jury what he did expect, which the jury didn't know." The Government attorney stated that by so indicating an affirmative answer to the court he only intended to say, Yes, that he did know what answer Annerino would give to the question. The trial judge then refused defendant's demand that a mistrial be declared, saying that the only improper statement which the jury had seen or heard had been the defense attorney's unreasonable interpretation of the prosecutor's acts which he expressed in the presence of the jury. The court then said to the defense attorney: "You can't put error in the record and then ask to have a juror withdrawn on that ground." After the defense objected to this statement, the judge said: "You said something which hadn't been said. If it was said, the jury hadn't seen or heard * * *."

The defendant claims that he was also prejudiced by the court's "rebuke" of the defense attorney during the discussion of the prosecutor's answer to the judge's question as to whether he knew what answer Annerino would make to the question as to whether or not Annerino knew when he first talked to Durham that De Marie "was engaged in transactions relative to narcotics."

The defense attorney's interpretation of the prosecuting attorney's answer was not a reasonable one, and we agree with the trial judge that if any prejudicial statements were made before the jury, they were made by the defense attorney. The judge's statements were not a "rebuke" as defendant claims, but simply an attempt to ex-

plain why he was overruling the defendant's insistent motions that a juror be dismissed and a mistrial declared.

The only "rebuke" of the defense attorney by the court we find in this record followed a statement by defense counsel that the Government attorney, by his questioning of Annerino on redirect examination, was attempting "to induce the witness to change his testimony." The court was fully justified in saying to defense counsel, "That is an improper remark in the presence of the jury, and don't repeat it." Defense counsel admitted his error by apologizing to the court.

In his instructions to the jury the court told the jury that:

> "The responsibility rests upon you to determine the facts of this case, under the law as the Court may give it to you, uninfluenced by any expression of opinion that the Court has made or may hereafter make upon matters of fact. The Court has not intended at any time during the trial of this case, and does not intend at any time to express any opinion on any matter of fact, and if the Court has expressed or does express any opinion on any matter of fact you are at liberty to disregard such opinion, and it is your duty to disregard it, if it is different from your own opinion.
>
> • • •
>
> "During the trial of a law suit it often becomes the duty of counsel for the parties to object to questions or to evidence, and I instruct you that you shall not take into consideration against such party either such objection or the number of them, nor permit yourselves to be in any way influenced by such objections against the parties."

The judge gave an instruction on entrapment, tendered by the defendant, which said among other things that en-

trapment if found would be a complete defense. Later in the charge the court gave the following instruction as to the statutory presumptions in narcotics cases where the defendant is charged with violation of 21 U.S.C. Sec. 174:

> "The Court further instructs you that if you believe from all the evidence and beyond a reasonable doubt that the defendant De Marie had possession of the narcotics drugs as charged in Counts Three and Six, you are authorized to find him guilty under Counts Three and Six unless he has explained such possession to your satisfaction. * * *"

The defendant did not at the trial and does not here object to the law as explained in this instruction. He claims only that because it was read to the jury after the instruction on entrapment it nullified the effect of the instruction that entrapment is a complete defense. Of course, we need not now consider objections which were not made before the jury retired. Rule 30 of the Federal Rules of Criminal Procedure provides that "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" The purpose of this rule is to give the trial judge an opportunity to correct any error in the instructions.

The only ruling on instructions validly before us is the court's refusal to follow the suggestion of defense counsel as to the order in which the instructions should be given. When counsel were discussing the instructions with the court, counsel for the defense said: "It is my suggestion, Your Honor, that so far as the entrapment instruction is concerned, I would like to have it read to the jury as near to the end of the instructions as possible, so that its effect will not be lessened." The court refused this request, say-

ing that he was going to give the instructions in as nearly logical order as possible without "trying to favor anybody." It is well settled that on review we must consider the instructions as a whole. *Boyd* v. *United States*, 271 U. S. 104; *United States* v. *Wicoff*, 7 Cir., 187 F. 2d 886. The instructions given by the court on statutory presumptions correctly stated the law and were not in conflict with the charge that entrapment is a complete defense. It did not matter which instruction was given first. The order of giving these instructions was within the discretion of the trial judge. Neither party has the right to insist that his proposed instructions be given before or after those proposed by his opponent.

The defendant's final claim of error was that the trial court admitted evidence of a prior sale of narcotics by the defendant on January 25, 1954, which "vaguely, uncertainly and incompletely indicated a prior offense not charged in the indictment." The evidence of this prior offense was first brought into the record by the defendant's attorney in his cross-examination of the witness, Annerino. In answer to the questions of the defendant's attorney Annerino testified to the prior "sample" purchase from the defendant and Garelli of one ounce of narcotics for $90.00, "to see what kind of stuff it was." Annerino testified that he made arrangements for this purchase with the defendant by telephone after calling the telephone number which the defendant had given him to use when he wanted to make a purchase of narcotics. Annerino further testified that Marin, a narcotics agent, furnished him with the $90.00 purchase price for the narcotics and was with him when he met the defendant and Garelli; and that at that meeting Garelli handed the defendant the little package which the defendant, in turn,

handed to him (Annerino), who then paid the purchase price to the defendant. Defendant's counsel made no objection of any kind to these answers of the witness.

The Government's witness, Durham, a narcotics agent, on his direct examination was asked questions to corroborate Annerino's testimony as to Annerino's phone conversation with a person who was identified by Annerino's testimony as being Frank DeMarie. Durham testified that in that conversation arrangements were made for a "sample" purchase on January 25, 1954. Agent Durham further testified that he heard that conversation in which a meeting for a purchase was arranged; that he followed Annerino to the agreed meeting place; and that he there witnessed a meeting between Annerino and the defendant. Durham did not testify as to the purchase.

The first objection which the defendant's attorney made to the testimony of Durham relating to the above described phone conversation of Annerino was that the witness was not familiar with De Marie's voice, and only knew from what Annerino said that it was De Marie talking to Annerio. This was not a valid objection because Durham did not say that it was De Marie who was talking to Annerino.

The next objection made by defendant's counsel to Durham's testimony was that Durham was not testifying as to the same conversation as described by Annerino. Defense counsel based this objection on slight variations between Durham's testimony and that of Annerino as to just what was said. But, as the trial judge pointed out, there were bound to be slight variations in the testimony of two witnesses trying to describe the same conversation.

After Durham described the movements of Annerino in going to the meeting place and the meeting with De Marie, the defendant's attorney said: "I object to all of this, Your Honor, and move that it be stricken. It is apparently an attempt to prove an offense not charged in the indictment."

Defense counsel then asked the Government attorney if the Government was trying to prove another offense and was told that the Government was only corroborating the story of its witness, Annerino. The defendant's attorney then said: "I object to that, that was not the direct testimony of Annerino at all." Defendant's attorney was again apparently relying on slight differences in the stories of the two witnesses.

As we have shown above, the entire story of Annerino's "sample" purchase of narcotics from the defendant was placed before the jury by the defendant's attorney in his cross-examination of Annerino. Certainly a party cannot complain of the evidence which his attorney has put in the record.

As to the testimony of Agent Durham, no valid objection was made at the proper time to any of his testimony and in the absence of a valid objection made at the proper time, a party may not on appeal claim that the introduction of such evidence was error.

We find no prejudicial error in this record. The judgment of the District Court is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgments and Orders of Court of Appeals.

Order entered November 7, 1955, affirming judgment of District Court.

Order entered November 29, 1955, denying petition for rehearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 597

FRANK DE MARIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-9; R. 45-51) [1] is reported at 226 F. 2d 783.

JURISDICTION

The opinion of the Court of Appeals was entered on November 7, 1955, and a petition for re-

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[1] We have numbered the pages of the record, referred to as "R", in pencil at the lower right hand corner of each page. "Tr." will refer to pages in the transcript of the trial proceedings.

hearing was denied on November 29, 1955 (Pet. App. 10; R. 52, 53). The petition for a writ of certiorari was filed on December 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for violation of narcotics laws, the earlier part of the court's final charge to the jury dealing with entrapment was nullified by the subsequent portion covering statutory presumptions arising from possession of drugs and the possible guilt of petitioner as an aider or abettor.

2. Whether on the redirect examination of a government witness, when petitioner's counsel made a misstatement as to what had occurred in a colloquy and the court corrected him, the court's remarks prejudicially impugned counsel's motives and impinged upon petitioner's right to effective assistance of counsel.

STATEMENT

In a six-count indictment embracing separate transactions on February 2 and February 16, 1954, petitioner and his co-defendant, Garelli, were charged in the United States District Court for the Northern District of Illinois with unlawful purchase of 5 ounces of heroin, not in or from the original stamped package, in violation of 26 U.S.C. (1952 Ed.) 2553(a); unlawful sale of these drugs to one Marin, not in pursuance of a written order

form, in violation of 26 U.S.C. (1952 Ed.) 2554(a); and unlawful receipt and concealment of these drugs, knowing that they were imported into the United States contrary to law, in violation of 21 U.S.C. 174 (R. 5-10). Garelli pleaded guilty to counts 3 and 6, and the other counts were dismissed as to him (R. 13). The jury found petitioner guilty as charged (R. 16, 18; Tr. 338). Petitioner was given an aggregate sentence of 10 years' imprisonment and a $2,000 fine (R. 22-23; Tr. 365-366). On appeal (R. 33-34), the conviction was unanimously affirmed (R. 52).

Pertinent evidence and trial proceedings are as follows:

a. Government informer Annerino testified that he had known petitioner for five years (Tr. 6), and that in October 1953 petitioner stated that he would furnish narcotics whenever Annerino wanted them (Tr. 7). This conversation occurred prior to a time when narcotics agent Durham asked Annerino at the Morrison Hotel in Chicago if he could make a "buy" from petitioner, and Annerino replied that this could be arranged (Tr. 28, 66-67). On January 23, 1954, petitioner gave Annerino a Chicago telephone number and told him to telephone for "five tickets for the game" if he should want five ounces of heroin (Tr. 9). Petitioner introduced Annerino to Garelli, and stated that at any time Annerino called this telephone number Garelli would take care of the transaction (Tr. 14-15).

Annerino, on behalf of his "partner", government agent Marin, made two purchases of heroin at meetings with petitioner and Garelli on February 2 and February 16, 1954, which were observed by federal agents (Tr. 16-23, 44-46, 61-62). Although Annerino had the localities of the two transactions interchanged in his testimony, the corroborative testimony of the narcotics agents showed that the February 2 sale occurred at 23rd and Oakley, with petitioner driving, and Garelli leaving the automobile to put the narcotics into Marin's car and remove the money from the glove compartment (Tr. 86-89, 94-97, 144-146, 159-163). The February 16 sale occurred at Hamilton and Taylor, with petitioner handling the narcotics money and Garelli driving (Tr. 102, 104-109, 167-169, 173-178). There were no tax stamps or order forms for the heroin (Tr. 98, 135, 149, 152, 164, 178, 184-185, 256). The parties stipulated that if the government chemist were called he would testify that the drug contained in the exhibits was heroin hydrochloride (R. 186-188).

Petitioner testified that in the incident of February 2, 1954, Garelli just asked him to take a ride; that Garelli said Annerino owed him some money; that Garelli gave petitioner for delivery a package which he (petitioner) suspected contained narcotics; and that petitioner picked up the money from the glove compartment of the government agent's automobile (Tr. 215-216, 220). As to the incident on February 16, 1954, petitioner's testi-

mony was that Garelli placed the package in the agent's automobile; that when Garelli returned to his car petitioner did not see him with any money; but that later Garelli gave petitioner $20 or $30 which he owed on a personal loan (Tr. 217-220).

After a week-end recess of the trial, petitioner changed his previous testimony that he had merely suspected narcotics were involved in the February 2 and February 16, 1954, transactions, and testified that he had knowledge that narcotics were involved (Tr. 233). Petitioner assigned as the reason for his turnabout testimony that he had been ashamed to admit that he had anything to do with narcotics, since this would have involved adverse publicity for his family (Tr. 237). He testified that the first time Annerino mentioned the subject of narcotics was in January 1954 (Tr. 243, 235-236), which was contrary to Annerino's testimony that this had occurred in October 1953 (Tr. 7).

b. On the redirect examination of witness Annerino by the government attorney, the following occurred (Tr. 62-65):

> By Mr. CALIHAN [government counsel]: One question further, Mr. Annerino. Did you know at the time you talked to Agent Durham in the lobby of the Morrison Hotel here in Chicago, Illinois, did you know prior to that time whether Frank DeMarie was engaged in transactions relative to narcotics?
>
> By Mr. WALSH [defense counsel]: I object

to this, your Honor, and ask to withdraw a juror and have a mistrial declared.

By Mr. CALIHAN: Your Honor, counsel went into this question very thoroughly, and I think that the time element as drawn out by counsel is not a bit clear.

By the COURT: Well, he may answer. Motion denied.

By Mr. WALSH: The objection is overruled and the motion is denied.

By the COURT: Yes.

By Mr. CALIHAN: Will you answer the question, please?

By the WITNESS: Will you repeat the question?

By Mr. CALIHAN: Read the question, please.

By the COURT: Do you know what answer he would make to that?

By Mr. WALSH: I object to this in the presence of the jury. If your Honor please, the record will not show Mr. Calihan's indication to your Honor that he expects an affirmative answer.

By the COURT: Now you just told the jury what he did expect, which the jury didn't know.

By Mr. WALSH: Your Honor, he nodded his head to your Honor.

By Mr. CALIHAN: He asked if I knew what answer I expected, and I said "Yes."

By Mr. WALSH: I think that should be on the record.

By the COURT: You just put it on the record of your own volition.

By Mr. CALIHAN: I was merely answering in the affirmative that I knew what the man would say.

By the COURT: Objection sustained.

By Mr. WALSH: I submit the conclusion that the jury would draw——

By the COURT: Denied.

By Mr. WALSH: I ask that a juror be withdrawn and a mistrial declared.

By the COURT: I denied that for you. You can't put error in the record and then ask to have a juror withdrawn on that ground.

By Mr. WALSH: I object to this.

By the COURT: That is just what I am telling you.

By Mr. WALSH: I object, your Honor.

By the COURT: You said something which hadn't been said. If it was said, the jury hadn't seen or heard.

By Mr. WALSH: I object to your Honor's statement.

By the COURT: That is just what I am putting on the record because that is exactly what happened.

By Mr. WALSH: I renew my motion.

By the COURT: Your motion is denied. Anything else?

By Mr. CALIHAN: I would like to have the question read.

By Mr. WALSH: I object to this.

By the COURT: Objection sustained.

By Mr. CALIHAN: Judge, we never did get to the answer.

By the COURT: I know it. I sustain the objection to it.

c. The court's charge to the jury contained the following:

> The Court instructs you that, while it is permissible for Government agents or officers to present to one intending or who is willing to commit a crime an opportunity to commit a crime, it is not proper for Government agents or officials to ensnare the innocent and law-abiding into the commission of crime. If a criminal design originates not with the accused, but is conceived in the mind of Government agents or officers, and the accused is lured into the commission of a criminal act by such Government agents or officers, it is not proper for the Government to prosecute or punish therefor. But if a defendant be ready, able and willing to commit an offense of the general character charged, and the officer only presents an opportunity to commit the specific offense charged, such offering of the opportunity to commit the specific offense is not entrapment.
>
> The Court instructs you that entrapment of a defendant by Government officers, if shown by the evidence, is a complete defense, and in cases where the defense of entrapment is presented two questions of fact arise: First, did the agent induce the defendant, the ac-

> cused, to commit the offense charged in the indictment; second, if he did, was the accused ready and willing, without persuasion, and was he awaiting a propitious opportunity to commit the offense. On the first question, the accused has the burden of proof; on the second question, the Government has the burden of proof, and as to such question it must prove that the accused was ready and willing, without persuasion, and that he was awaiting any propitious opportunity to commit the offense. [Tr. 320-321.]

Following these instructions defining entrapment and pointing out that it would constitute "a complete defense", the court described the alleged offenses, charged on reasonable doubt, instructed on the statutory presumptions arising from possession of narcotic drugs, and explained the law which makes an aider or abettor punishable as a principal (Tr. 322-329).

ARGUMENT

1. Petitioner contends that in the court's charge the earlier part dealing with entrapment (*supra*, pp. 8-9) was inconsistent with, and nullified by, the subsequent portion covering the statutory presumptions arising from possession of drugs and the possible guilt of petitioner as an aider or abettor (Pet. 10-16). As the court below held, the argument is unsubstantial on its merits; it also fails for the additional reason that it was not timely raised in the trial court.

The charge considered as a whole clearly does not contain inconsistent instructions. Cf. *Boyd* v. *United States,* 271 U.S. 104, 107; *Lunsford* v. *United States,* 200 F. 2d 237, 239-240 (C.A. 10) (question of entrapment not withdrawn from jury by reason of allegedly inconsistent instructions); *Schumacher* v. *United States,* 216 F. 2d 780, 789-790 (C.A. 8), certiorari denied, 348 U.S. 951; *United States* v. *Vrilium Products Co.,* 185 F. 2d 3, 6 (C.A. 7), certiorari denied, 340 U.S. 947. Although the jurors were not expressly told to consider the charge as a whole, and there was no request for any such specific instruction, it was implicit that they should do so. There was no numbering of the instructions, which were read as a composite; neither was there any direction, either express or implied, to consider parts of the charge separately and out of context. The entrapment instruction lost none of its efficacy merely because it preceded the later instructions, which did not in any manner emasculate it. Under the charge, if the jury had found that petitioner had been entrapped, this constituted (Tr. 320) a "complete defense," and the jury would have brought in a verdict of not guilty. There would then have been no occasion to deliberate on other instructions. It was therefore logical to have the instructions on the statutory presumption and aider or abettor follow the instructions on entrapment.[2]

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[2] Petitioner contends that all of his acts charged in the indictment were admitted on the trial, and that his only defense was entrapment (Pet. 11, 13). The record does not bear this

Moreover, petitioner's counsel clearly did not comply with Rule 30, F. R. Crim. P.,[3] since he did not make timely objection as to the alleged inconsistency of the instructions. When the trial court was considering the proposed charge, counsel did suggest that the entrapment instruction be read "as near to the end of the instructions as possible so that its effect will not be lessened." The court refused, saying, "I am going to give the instructions as nearly in logical order as possible. I am not trying to favor anybody." (Tr. 276.) Petitioner's counsel did not object, however, to the actual arrangement of the instructions until after the jury had retired (Tr. 334). The trial judge replied, "You didn't say anything to me about this instruction this morning. I never heard any complaint about this instruction until this moment. * * * You should have pointed that out to the Court this morning. I gave you twenty minutes

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out. Although petitioner did change his sworn testimony to admit that he knew narcotics were involved in the two transactions (Tr. 233), he testified with respect to the February 16 transaction that the money he received was not for the sale of drugs, but in payment of a personal loan he had made to Garelli (Tr. 217, 219, 256-257). He endeavored, moreover, to show that he did not "want any part" of the narcotics sales, and that Garelli was solely to blame for them (*e.g.*, Tr. 210-212, 213, 221, 233-234). Presumably he had hope, however slight, of being acquitted under the aider or abettor instructions if his entrapment defense failed.

[3] "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

this afternoon to talk to me about instructions, and you did not say anything about it. * * * You did not talk to me before the jury had retired. Now, I can't do it. You are trying to show something to me now that you didn't even point out to me before. I cannot open the case." (Tr. 335-337; R. 31-32.)

It is significant that petitioner does not challenge the content of the instructions on entrapment and the statutory presumption of guilt from unexplained possession of drugs. They correctly state the law. See *Sorrells* v. *United States*, 287 U.S. 435, 441, 451; *United States* v. *Sherman*, 200 F. 2d 880, 882-883 (C.A. 2); *Stoppelli* v. *United States*, 183 F. 2d 391, 394 (C.A. 9), certiorari denied, 340 U.S. 864; *Casey* v. *United States*, 276 U.S. 413, 418; *Yee Hem* v. *United States*, 268 U.S. 178.[4]

2. Equally without merit is petitioner's contention that by reason of the incident which occurred upon redirect examination of the witness Annerino (Statement, *supra*, pp. 5-8), statements by the trial court prejudicially impugned his counsel's motives and impinged upon his right to effective assistance of counsel (Pet. 16-19).

The trial court, in its memorandum opinion overruling petitioner's motion for a new trial or for

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[4] Decisions of this Court cited by petitioner are inapposite (Pet. 14). *Bollenbach* v. *United States*, 326 U.S. 607, involved an incorrect statement of law in a last-minute charge to a deadlocked jury, regarding a presumption arising from possession of stolen property. *Tot* v. *United States*, 319 U.S. 463, struck down an untenable statutory presumption as unconstitutional.

judgment notwithstanding the verdict, stated in regard to this incident (R. 27):

> After the court's question to the prosecutor "Do you know what answer he would make to that?", the prosecutor, Mr. Calihan, turned his back to the jury, thereby faced Mr. Walsh, counsel for [petitioner], and framed the word "Yes" with his lips. The jury could not see what the prosecutor did, other than the turning of his back. The court reporter did not hear any answer and none was made audibly, but counsel for [petitioner], in a loud tone of voice, immediately told the jury something that they had not theretofore known in the following words:
>
> > "I object to this in the presence of the jury. If your Honor please, the record will not show Mr. Calihan's indication to your Honor that he expects an affirmative answer."
>
> As has been indicated, counsel for [petitioner] is an experienced lawyer, and as the court believes, deliberately told the jury something that they had not theretofore known. * * *

The statements by the trial court before the jury at the time of the trial did not prejudicially impugn the motives of petitioner's counsel.[5] The

[5] Contrast *Lau Lee* v. *United States*, 67 F. 2d 156 (C.A. 9), upon which petitioner relies (Pet. 17), where the trial court in

court merely made certain that the record would show with complete accuracy what had occurred, *i.e.*, that defense counsel had stated that the government attorney indicated to the court that he expected an affirmative answer to his question, when as a matter of fact the prosecutor had made no such indication, but only that he knew what the witness would say. The court at first ruled that the question should be answered, but shortly afterward reversed its decision (Tr. 63, 65), presumably on the ground that possible other narcotics transactions engaged in by petitioner were irrelevant and immaterial. Petitioner thus succeeded in preventing the jury from hearing any answer to the question.

The court's final charge, moreover, quoted by the court below (Pet. App. 5), gave further assurance against prejudice from this incident, reminding the jurors of their exclusive authority to determine the facts and emphasizing that they were not

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very strong language stated in a colloquy with defense counsel that he had made "untrue statements," that he had not proceeded in a "straightforward, honest manner," and that he "misled the jury if any person ever attempted to mislead a jury" (67 F. 2d at 157).

to be influenced in this task by whether counsel for either side had made objections during the trial or by the number of such objections.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1956.

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